

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JIM H. WILSON

Claimant

VS.

BELL MIRROR AND GLASS, INC.

Respondent

AND

**KANSAS BUILDING INDUSTRY
WORKERS COMPENSATION FUND**

Insurance Carrier

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Docket No. 1,049,204

ORDER

Claimant appeals the March 23, 2010, preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes (ALJ). Claimant was denied benefits after the ALJ determined that claimant had failed to prove that he had suffered personal injury by accident which arose out of and in the course of his employment with respondent.

Claimant appeared by his attorney, Chris A. Clements of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Roy T. Artman of Topeka, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held March 23, 2010, with attachments; and the documents filed of record in this matter.

ISSUE

Did claimant suffer personal injury by accident which arose out of and in the course of his employment with respondent? Respondent contends that the events immediately after the alleged accident, including contemporaneous medical reports, do not support claimant's allegations of a work-related accident. Claimant alleges his failure to immediately claim a work-related accident is explained in this record.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant had worked for respondent installing mirrors, showers and other glass products. On December 29, 2009, he was working at a location with a contractor. Claimant testified that the contractor's truck was stuck and claimant went to help move the truck. Claimant slipped on the ice and snow, alleging injury to his groin and low back. Claimant completed that day's work and did not report the injury to any respondent representative. Claimant did mention the incident to a co-worker, Carl Smith. Claimant was scheduled to work the next day, December 30, 2009, and four hours on December 31, 2009. Claimant worked both days, not mentioning the incident to any respondent representative. Claimant was next scheduled to work January 4, 2010. On that day, claimant worked his full shift, and then, at the end of the shift, spoke to Kimberly Bell, respondent's human resources manager, about the pain in his back. Claimant did not tell her of a work accident. He did advise that he was seeking medical treatment for his back pain with his family doctor, Benjamin Davis, M.D., the next day, but that the condition was not work related. Claimant told Kim that he was not sure how he had hurt his back.

On January 2, 2010, claimant was examined by William Simon, D.O., of the same office as Dr. Davis. Dr. Simon was advised of claimant's back and groin pain with radiating pain on the right side. Claimant advised that there was no known injury associated with these complaints. Claimant was again examined by Dr. Simon on January 5, 2010, and was then referred to his own doctor, Dr. Davis. The medical report from the office of Dr. Davis, which is dated January 5, 2010, describes the low back, groin and right hip pain. Again, the report states that there is no known injury, although claimant testified at preliminary hearing that he had advised Dr. Davis of the work-related injury. An MRI was ordered, and claimant was provided with restrictions, limiting his lifting to 40 pounds. A January 7, 2010, examination noted the groin pain was almost completely gone, but the back pain remained.

After the examination on January 7, 2010, claimant picked up his paycheck from respondent. The paycheck statement form¹ displays claimant's signature next to his name. The form contains a column indicating whether a worker had sustained a work-related injury during the pay period, which began on December 28, 2009, and ended on January 1, 2010. Claimant marked that he had not suffered a work-related injury during that time period. At preliminary hearing, claimant alleged that Ms. Bell had told him he could not mark the column yes.

¹ P.H. Trans., Resp. Ex. 1.

Claimant testified that he discussed the work-related accident with Ms. Bell after the doctor's appointment. She denied talking to claimant on January 7, 2010, about the paycheck statement form. She did talk to claimant about his back pain and the fact he was still going to the doctor. Ms. Bell testified that a discussion with claimant about the allegations of a work-related accident did not occur until January 11, 2010. Ms. Bell testified that January 11, 2010, was the first time claimant alleged a work-related accident associated with his back pain.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.²

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.³

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁴

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

... have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."⁵

In order to award claimant benefits for an accident on December 29, 2009, claimant's testimony regarding the accident must be believed. The ALJ apparently did not

² K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g).

³ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁴ K.S.A. 2009 Supp. 44-501(a).

⁵ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

find claimant to be a credible witness. Claimant's initial contact with Kimberly Bell contained a denial of a work-related accident. The initial contacts with both Dr. Simon and Dr. Davis contained statements that there was no known accident. When claimant picked up his paycheck on January 7, 2010, he marked a form on which he denied that he had suffered an injury during the work period in question. It is claimant's burden to prove his allegation of a work-related injury. Claimant has failed to do so. The denial of benefits by the ALJ is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has failed to prove, by a preponderance of the credible evidence, that he suffered a work-related accident on December 29, 2009. The denial of benefits by the ALJ is affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated March 23, 2010, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of May, 2010.

HONORABLE GARY M. KORTE

c: Chris A. Clements, Attorney for Claimant
Roy T. Artman, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge

⁶ K.S.A. 44-534a.